Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

Nos. 90-1419 and 90-1769

In the Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL., PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
CHARLES A. STARK
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

JOHN G. ROBERTS, JR.
Acting Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
MICHAEL R. DREEBEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Interstate Commerce Commission is not empowered by Section 402(d) of the Rail Passenger Service Act of 1970, 45 U.S.C. 562(d), to approve the condemnation by the National Railroad Passenger Corporation (Amtrak) of railroad track that Amtrak intends to reconvey to another railroad.

2. Whether the court of appeals erred, on rehearing, in persisting in that holding despite Congress's amendment of Section 402(d), in direct response to the court's initial decision, to clarify that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act" (Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4658).

3. Whether the Commission's allowance of Amtrak's condemnation and subsequent conveyance should have been upheld by the court of appeals in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-27a)[1] is reported at 911 F.2d 743. The order of the

[1] References to "Pet. App." in this brief are to the appendix to the petition in No. 90-1419. The parties to the proceedings

court of appeals on the denial of rehearing (Pet. App. 1a-4a) is reported at 925 F.2d 427. The final decision of the Interstate Commerce Commission (Pet. App. 29a-109a) is reported at 4 I.C.C.2d 761. Interim decisions of the Commission served July 5, 1988, May 25, 1988, and April 29, 1988 (Pet. App. 110a-112a, 113a-118a, 119a-135a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. The petitions for rehearing were denied on February 1, 1991. Pet. App. 1a-4a. The petition for a writ of certiorari in No. 90-1419 was filed on March 11, 1991. On April 23, 1991, Chief Justice Rehnquist extended the time within which to petition for a writ of certiorari in No. 90-1769 to and including May 16, 1991, and the petition was filed on that date. The Court granted the petitions in No. 90-1419 and No. 90-1769 and consolidated them on October 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d), and Section 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, are set forth in the appendix to this brief (App., *infra*, 1a-3a).

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in the court of appeals, in addition to the Interstate Commerce Commission and the United States, were Boston and Maine Corporation, Canadian Pacific, Ltd., Central Vermont Railway, Inc., Commonwealth of Massachusetts, National Railroad Passenger Corporation, Railway Labor Executives Association, State of Vermont, and Windsor Minerals, Inc.

STATEMENT

A. The Statutory Scheme

The National Railroad Passenger Corporation (Amtrak) is a private, for-profit corporation created by Congress in order to revitalize and maintain intercity and commuter passenger train travel in the United States. 45 U.S.C. 541. See generally *National R.R. Passenger Corp.* v. *Atchison, T. & S. F. Ry.*, 470 U.S. 451, 453-455 (1985). In the statute that created Amtrak, the Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1328, Congress recognized that Amtrak would run its passenger trains primarily over existing and future track systems of freight railroads rather than constructing or purchasing its own track networks; accordingly, it authorized Amtrak, among other things, to enter into "trackage rights" agreements that give Amtrak the right to use the tracks of other railroads. 45 U.S.C. 562(a). Congress further provided that if Amtrak and the railroads cannot reach agreement on their own, Amtrak may request the Interstate Commerce Commission (ICC) to prescribe necessary trackage rights agreements. 45 U.S.C. 562(a).

Three years after enacting RPSA, Congress amended the statute with Section 402(d), empowering Amtrak to acquire railroad property by eminent domain. Finding that Amtrak's "inflexible site requirements" might reduce its bargaining leverage and expose it to unreasonable demands in acquiring property it needed from railroads, see S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), Congress gave Amtrak the right to condemn property of railroads that is "required for intercity rail passenger service" if Amtrak and the railroad cannot agree on terms of sale. 45 U.S.C. 562(d)(1). To condemn property under

Section 402(d), Amtrak must apply to the ICC for an order that establishes Amtrak's "need" for the property and requires its conveyance. 45 U.S.C. 562 (d)(1). Section 402(d) states that the "need" of Amtrak "shall be deemed to be established" unless the ICC finds that (A) conveyance to Amtrak "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* (B) Amtrak can fulfill its obligations by acquiring an alternative property interest that is "available for sale on reasonable terms," or is available through the exercise of Amtrak's power under a companion provision (45 U.S.C. 545(d)) that authorizes Amtrak to condemn non-rail private property. 45 U.S.C. 562 (d)(1).[2]

B. The ICC's Determinations

This case involves Amtrak's use of Section 402(d) to condemn a line of track belonging to the Boston and Maine Corporation (B&M) for the purpose of reconveying the track to Central Vermont Railway, Inc. (Central Vermont)—a transaction designed to restore passenger service on Amtrak's "Montrealer" train between Washington, D.C., and Montreal, Canada.

1. In 1972, Amtrak began providing Montrealer service. In crossing portions of New England, the Montrealer used the tracks of the Connecticut River Line (Conn River Line). B&M owned a 48.8 mile portion of that line running between Brattleboro, Vermont, and Windsor, Vermont. In 1977, Amtrak and B&M had entered into a trackage rights agreement covering this stretch. Over time, however, B&M

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[2] Congress amended 45 U.S.C. 562(d) following the panel's rejection of the ICC's decision in this case; the amendment is discussed at pp. 10-11, *infra*.

failed to maintain the tracks in a suitable condition to permit Amtrak to provide the high-speed service needed for Amtrak's trains.[3] Because of the track's deterioration, Amtrak discontinued its Montrealer service on April 5, 1987.[4] Pet. App. 9a, 121a-122a.

Convinced that B&M would not upgrade the track to the condition Amtrak required, Amtrak explored whether Central Vermont, which owned other portions of the Conn River Line, would do so. After discussions, Amtrak and Central Vermont agreed to the following terms: (1) Amtrak would exercise its condemnation power under Section 402(d) to acquire the track in question from B&M; (2) Amtrak would immediately reconvey the track to Central Vermont; (3) Central Vermont would repair and rehabilitate

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[3] B&M used the track only for freight service, see *Boston & Maine Corp. Discontinuance of Trains*, 328 I.C.C. 594 (relieving B&M of obligation to provide passenger service), aff'd *sub nom. Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80 (D. Vt. 1967) (3-judge court), and did not need to run high-speed trains.

[4] In 1987, Amtrak instituted an arbitration proceeding claiming that B&M had breached its maintenance obligations; B&M refused to arbitrate, claiming that the trackage rights agreement had expired. The D.C. Circuit eventually ordered B&M to arbitrate the dispute. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756, 758 (1988). Subsequently, the arbitration panel concluded that B&M had breached its obligation to use its best efforts to maintain the track at the minimum speeds required by Amtrak; the panel found that B&M had deliberately allowed the line to deteriorate and had made essentially no efforts to maintain it. B&M had taken this course of action because its parent company had decided to devote energies and funds to maintaining a parallel rail line that the parent controlled. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, Nos. 72 & 74 (Nat'l Arb. Panel Nov. 7, 1988).

the segment to meet Amtrak's standards; (4) Central Vermont would grant trackage rights to B&M for it to serve its existing customers; and (5) Amtrak would be granted trackage rights for its Montrealer service for 20 years. Amtrak's responsibility for payments for rehabilitation of the track was capped at $3.1 million, with funds to come from a $5 million grant that Congress had appropriated for Amtrak to use in restoring Montrealer service.[5] Pet. App. 10a-11a, 41a-42a, 122a-123a, 130a n.11.

2. As a prerequisite to invoking condemnation, Amtrak offered to purchase the segment of track from B&M. After B&M refused the offer, Amtrak requested the ICC to institute condemnation proceedings under Section 402(d). In addition, Central Vermont requested an exemption from ICC regulation for its acquisition of the former B&M line from Amtrak.[6] Pet. App. 12a, 29a-30a, 119a-120a, 125a. After noting that "this is an extraordinary proceeding," marking only the first decided case in which Amtrak had invoked Section 402(d), Pet. App. 39a, the ICC approved the applications of Amtrak and Central Vermont. *Id.* at 29a-109a.

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[5] Act of July 11, 1987, Pub. L. No. 100-71, 101 Stat. 447-448 (providing funding to improve track as needed "to restore railroad passenger service between Springfield, Massachusetts and Montreal, Canada through Vermont").

[6] The transfer to Ceneral Vermont was subject to a requirement of ICC approval under 49 U.S.C. 11343. Pursuant to 49 U.S.C. 10505(a), however, the ICC is required to exempt a transaction from regulation when it finds that application of a provision of the Interstate Commerce Act is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and either the transaction's scope is limited, or regulation "is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a)(2)(B).

In its interim and final decisions, the ICC rejected B&M's plea to convert Amtrak's condemnation application under Section 402(d) into a request for prescribed trackage rights under Section 402(a).[7] It found that Amtrak had an "election of remedies" to proceed under Section 402(d), and pointed out that "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service."[8] Pet. App. 39a, 115a-116a. The ICC further found that Amtrak had a legitimate purpose for the acquisition and was not abusing its condemnation powers to advance private aims of Central Vermont or its parent company, the Canadian National Railway. *Id.* at 41a-43a. The ICC responded to the concern raised by B&M that Amtrak's interpretation of the statute would "encourage any freight railroad to acquire ownership of a competitor's line simply by currying Amtrak's favor and agreeing to grant trackage rights to the former

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[7] Section 402(a) provides, in pertinent part, that if Amtrak cannot agree with a railroad on a contract for the use of the railroad's tracks, the ICC "shall, * * * if it finds that doing so is necessary to carry out the purposes of this chapter, order * * * the use of tracks * * * on such terms and for such compensation as the Commission may fix as just and reasonable." 45 U.S.C. 562(a).

[8] The ICC noted B&M's claim that it stood ready to restore the track if adequately compensated, and that it would submit to a third party decisionmaker (such as the ICC) the issue of how to allocate costs to maintain the line at the speeds required by Amtrak. But the ICC found that nothing in the Act *demanded* that Amtrak pursue trackage rights procedures rather than invoking condemnation-and-transfer procedures. Pet. App. 114a-116a.

owner," by noting that the Commission's regulatory review of Amtrak's transfer of condemned property to another railroad would prevent any abuses. *Id.* at 43a.[9]

The ICC also concluded that Amtrak's statutory "need" for the conveyance was established. See 45 U.S.C. 562(d)(1)(A) and (B). The Commission found that "there is no adequate alternative property available for Amtrak to acquire" for its Montrealer service because Amtrak desires to route the Montrealer through Vermont, and alternative routes are prohibitively expensive to rehabilitate. Pet. App. 45a-46a. The ICC also found that B&M would not suffer "significant impairment" in its common carrier operations because it will receive just compensation for its property and can continue to serve local traffic under a trackage rights agreement. *Id.* at 46a. Having approved the condemnation, the ICC then exempted from regulation Amtrak's conveyance of the line to Central Vermont, finding that the competitive situation on the Conn River Line would not be adversely affected (and, indeed, would be improved), and that B&M as well as Central Vermont would benefit from "rehabilitation of the line" which was "desperately in need of maintenance." *Id.* at 84a.

Pursuant to the ICC's orders, B&M's line was conveyed to Amtrak for just compensation, and Amtrak immediately reconveyed the line to Central Vermont. Applying funds provided by Amtrak, Central Vermont upgraded the track, and Montrealer service resumed in July 1989. Pet. App. 13a.

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[9] The ICC declined to address B&M's claim that the condemnation power, as construed by Amtrak, was unconstitutional, but noted that it believed that the condemnation power exercised here fulfilled a valid public purpose. Pet. App. 44a-45a.

C. The Court of Appeals' Decision

1. On B&M's petition for review, a divided court of appeals set aside the ICC's order approving the conveyance of the line to Amtrak. Pet. App. 5a-23a. The majority declared that under the terms of the statute, Amtrak was not authorized to exercise condemnation power "to force the conveyance of property from one private owner to another" because such a transaction did not satisfy Section 402(d)'s provision that condemned property must be "required for intercity rail passenger service" by Amtrak. In this case, the court of appeals stated, Amtrak did not "require" title to the entire fee interest in B&M's line, but needed only *use* of the rail line in a condition adequate for Montrealer service. To obtain that interest, Amtrak could have invoked the mandatory trackage rights procedures established by Section 402(a). Moreover, the court thought that permitting this transaction would compromise a statutory policy against cross-subsidization of one segment of the rail industry by another, because it would invite Amtrak to shop for a below-cost provider of trackage rights. Finding the statute to be "unambiguous" on this point, the court declined to defer to the ICC's contrary interpretation of Section 402(d). Pet. App. 16a-18a, 20a, 22-23a.

In the alternative, the court of appeals concluded that the ICC had not sufficiently explained why Amtrak's "need" was established under Section 402 (d)(1)(A) and (B). In criticizing the ICC's finding that B&M's operations would not be significantly impaired, the court found error in the ICC's reliance on the trackage rights agreement that B&M would be granted; according to the court, the statute mandates consideration of the impact of the conveyance itself without regard to post-conveyance "remedies aimed

at ameloriating the impairment." Pet. App. 19a. The court also rejected the ICC's finding that Amtrak had no adequate alternatives to condemning the fee, because the ICC had not explained why the lesser interest of an easement for use of B&M's track, or prescriptive trackage rights, would be inadequate. *Id.* at 19a-20a.

Finally, the court found its construction of the statute to be confirmed by the constitutional questions it thought would be raised if Amtrak were empowered to condemn private property to transfer it to another private owner, and the absence of a clear statement from Congress that it intended to permit that result. Pet. App. 21a-23a.

Judge Ruth B. Ginsburg concurred in the judgment, but disagreed with the majority's interpretation of the statute. She concluded that even when Amtrak's ultimate goal is only the use of the track, Amtrak is not precluded from condemning a fee interest, provided the transaction is necessary to enable Amtrak's passenger service to go forward. In her view, a railroad's intransigence in refusing to restore track that Amtrak needed to use would satisfy that test. Although Amtrak advanced such an account of events, she believed the ICC had not made a specific determination crediting Amtrak's story. Accordingly, Judge Ginsburg concluded that a remand was required. Pet. App. 24a-27a.

2. The ICC and Amtrak petitioned for rehearing. While the petitions were pending, Congress amended the statute to overturn the majority's construction—and, specifically, to permit the present transaction to be consummated [10]—by adding to Section 402(d)(1)

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[10] See 136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990) (statement of Sen. Jeffords).

the provision that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a), 104 Stat. 4658, amending 45 U.S.C. 562(d)(1) [hereinafter ISBA]. The amendment was explicitly made applicable to pending cases. § 9(b), 104 Stat. 4658.

The court of appeals nevertheless denied the petitions for rehearing. The majority interpreted the amendment to apply only to conveyances that occur *after* Amtrak has properly condemned property; the court proclaimed that the amendment did not alter the limitation on Amtrak's condemnation authority that the subject property must be "required for intercity rail passenger service"—a requirement that, in the court's view, could not be fulfilled when Amtrak could have "instead achieve[d] the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power." Pet. App. 3a. The court further stated that its holding rested on perceived deficiencies in the ICC's findings under 45 U.S.C. 562(d)(1)(A) and (B) with respect to Amtrak's "need" for the property, and that those holdings were not affected by the amendment. Pet. App. 3a. Judge Ginsburg reiterated her disagreement with the majority's interpretation of the statute, concluding that the amendment "coincide[d]" with her view that the ICC had "plausibly interpreted * * * 45 U.S.C. § 562." *Id.* at 4a.

SUMMARY OF ARGUMENT

At issue in this case is the ICC's order approving Amtrak's condemnation of a segment of one railroad's track and its reconveyance to another railroad—a transaction that Amtrak thought necessary to ensure responsible, reliable, and efficient maintenance of the track and the resumption of Amtrak's Montrealer passenger train service. The court of appeals invalidated the ICC's order. In direct response to the court of appeals' decision, Congress amended Section 402 (d) to reject the court's mistaken interpretation of the law. The court of appeals failed to give effect to that determination as well. Because the court of appeals erred in refusing to follow Congress's clearly expressed intent, its judgment should be reversed.

A. The effect of the amendment is properly understood against the background of the original law. Under the original version of Section 402(d), the ICC interpreted the statute to authorize Amtrak's condemnation of B&M's track in order to convey it to another railroad. Section 402(d) does not speak directly to this issue, and, accordingly, the ICC's reasonable interpretation of the statute should be upheld. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The court of appeals thought that the phrase "required for intercity rail passenger service" in Section 402 (d), which describes the type of property interest that Amtrak may condemn, unambiguously meant that Amtrak must desire to own the property itself. Nothing in the statutory language compels that reading, however, and there is an equally reasonable interpretation —which the ICC's order embraces—that "required for intercity passenger service" simply means that

the property to be condemned must be put to use in Amtrak's provision of such service.

The court of appeals also erred in finding that the structure of the statute prohibits Amtrak from condemning track that it intends to convey to another railroad while retaining trackage rights for Amtrak's trains. The court noted that Section 402(a), 45 U.S.C. 562(a), allows Amtrak to apply for prescriptive trackage rights in appropriate cases. But nothing in the statute requires that Amtrak seek trackage rights in lieu of condemnation. To the contrary, that is not among the limitations on Amtrak's condemnation authority that the statute specifies. The statute as a whole demonstrates that Congress's intention was to afford Amtrak a range of remedies to suit the problems it would encounter in building and maintaining a network of passenger train routes. The choice among those remedies is left to Amtrak's business judgment, subject to ICC oversight.

The court of appeals went beyond the proper scope of judicial review in balancing the competing policies implicated by Amtrak's action here. Not only is the responsibility to make such policy choices vested in the ICC, but the court's ultimate conclusion, which strips Amtrak of an important remedy for securing fair arrangements with the freight railroads, is directly contrary to Congress's purposes in enacting Section 402(d).

B. The 1990 amendment to Section 402(d) removes any doubt that the ICC's order should be upheld. The amendment states that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." The only plausible interpretation

of that language—particularly when read in light of its history—is that Amtrak may seek a greater property interest than it intends to retain, without jeopardizing its right to a condemnation order under Section 402(d). The court of appeals' contrary reading effectively nullifies the amendment.

C. The court of appeals' alternative holding—that the ICC failed to make findings to establish Amtrak's statutory "need" for the property—is also flawed. Unless the ICC finds that the taking will impair the railroad's common carrier functions *and* that Amtrak has alternative property interests available to it, Amtrak's need is established under the statute. The ICC found that B&M would not suffer impairment as a common carrier because it retained the right to operate trains over its former line as a condition of the condemnation, and, in any event, no other rail route would allow Amtrak to serve the New England States. The court of appeals' disagreement with that analysis rests on a rejection of the ICC's interpretation of the statute; that holding cannot be reconciled with *Chevron*.

D. Under a proper interpretation of the law, the ICC's order allowing the conveyance of B&M's line should be upheld. The property at issue in this case is required for the provision of Amtrak's Montrealer train service; Amtrak's statutory "need" is established; and the ICC's findings make clear that the reconveyance to Central Vermont of the former B&M track furthers the purposes of RPSA.

ARGUMENT

Amtrak Is Authorized By Section 402(d) Of RPSA To Condemn The Track Of One Railroad And Then Reconvey That Track To Another Railroad

Congress has now spoken to the issue in this case. After the court of appeals wrote its initial opinion, Congress amended Section 402(d) to make the controlling rule of law crystal clear: when the overall transaction furthers the purposes of RPSA, Amtrak *can* have rail property conveyed to it and then reconveyed to another railroad. That is exactly what happened here with respect to Amtrak's condemnation of B&M's track for the purpose of conveying it to Central Vermont. The amended Section 402(d) was enacted expressly to overrule the court of appeals' legal interpretations and establishes that the ICC's order in this case should be upheld.[11]

To put the amendment in context, we show that (1) under the original version of Section 402(d), the ICC permissibly interpreted the statute to authorize Amtrak's condemnation of B&M's track; (2) the amendment reaffirmed the ICC's interpretation and rejected the court of appeals' contrary reading of the statute; and (3) the court of appeals' alternative holding—that Amtrak did not establish its statutory "need" for the property—is based on legal error.

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[11] Congress provided that the amendment "shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any proceeding pending before any Federal court on such date of enactment)." Pub. L. No. 101-641, § 9(b), 104 Stat. 4658. As the court of appeals recognized, the provision therefore applies to this case. Pet. App. 3a. It is well settled that when Congress intends a new provision of law to apply to pending cases, that intent is controlling. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1577 (1990).

A. Section 402(d), As Originally Enacted, Authorized Amtrak To Acquire And Then Convey B&M's Track

1. The court of appeals concluded that RPSA's Section 402(d), as originally written, was "unambiguous" in precluding Amtrak from condemning rail property for the purpose of conveying that property to another railroad. Pet. App. 23a. That holding purported to rest on the "plain meaning" (*ibid.*) of the phrase in Section 402(d) that Amtrak's condemnation power applies only to property "required for intercity rail passenger service." 45 U.S.C. 562(d). The language, structure, and policies of the statute lend no support to the court of appeals' conclusion that Section 402(d) has a single, unambiguous meaning that conflicts with the ICC's interpretation. When "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Co.*, 111 S. Ct. 615, 624 n.5 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988).

Section 402(d)(1) states in relevant part:

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the [ICC] for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on reasonable terms and conditions, including just compensation.

45 U.S.C. 562(d)(1).

That language does not directly answer the question whether Amtrak can condemn rail property and then convey it to another railroad. A natural reading of the statute is that where Amtrak has made a reasonable business judgment that acquisition of property will promote intercity passenger service, the ICC is empowered, if the parties cannot agree on a sale, to order its conveyance upon making a statutory finding of "need"; the provision is silent on the possibility of subsequent reconveyance. The property to be condemned must be "required for intercity rail passenger service"; this implies that Amtrak may not condemn property for reasons unrelated to its train services.[12] But the use of the word "required" does not dictate that ownership of the property must be indispensable to Amtrak. Property that is "required for intercity rail passenger service" may also include property that is useful or appropriate to Amtrak's provision of intercity rail passenger service. See Webster's *Third New International Dictionary* 1929 (1986) (defining "require" to include the meaning "to call for as suitable or appropriate in a particular case."). The ambiguity in the statute was for the ICC to resolve. Cf. *Sullivan* v. *Everhart*, 110 S. Ct. 960, 966 (1990) (relying on alternative dictionary definitions to establish ambiguity).

In this case, Amtrak intended to use B&M's property for the provision of intercity rail passenger service on the Montrealer train; the condemnation and transfer of the fee interest to Central Vermont was

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[12] For example, if a railroad happened to own an airport, Amtrak could not invoke Section 402(d) to condemn it. Property that could not and would not be used in the provision of rail passenger service would not qualify as property that is "required for intercity rail passenger service."

integral to that goal. In upholding the condemnation, the ICC's order manifests the view that B&M's tracks were, as Amtrak had alleged, "required" for Amtrak's service. Pet. App. 39a-40a, 116a. Nothing in Section 402(d)'s language prohibits the ICC from interpreting RPSA to permit Amtrak to condemn a fuller property interest than it intends to retain, so long as the overall transaction promotes Amtrak's rail passenger service and the statutory standard of "need" for the property is met. 45 U.S.C. 562(d)(1). Because Section 402(d) may reasonably bear the ICC's interpretation, under *Chevron* the court of appeals erred in substituting its own.[13]

2. The structure of the statute supports the Commission's interpretation and certainty does not re-

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[13] The reasonableness of the ICC's interpretation is underscored by the fact that the Second Circuit has construed identical language in the non-rail counterpart to Section 402(d) to permit Amtrak to condemn property and then transfer it to another owner, where the property would then serve to facilitate Amtrak's passenger service. Section 305(d), 45 U.S.C. 545(d), which was enacted contemporaneously with Section 402(d), states that Amtrak may acquire by eminent domain non-rail private property "*which is required [for] intercity rail passenger service.*" 45 U.S.C. 545(d) (emphasis added). In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), cert. denied, 484 U.S. 954 (1987), the court of appeals interpreted that provision to allow Amtrak to condemn property adjacent to Amtrak's right-of-way, so that Amtrak could transfer the fee interest to a municipal owner who would construct a road over which Amtrak would retain an easement for use in servicing its track. There is no reason to read the phrase "required for intercity rail passenger service" differently under Sections 305(d) and 402(d). The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990).

quire a different result. The court of appeals erroneously perceived an "interplay" within Section 402 that requires Amtrak to rely on prescribed trackage rights under subsection (a) rather than exercising the power of condemnation-and-reconveyance under subsection (d) when Amtrak's ultimate goal is to be the user, rather than owner, of the track. Pet. App. 22a. Subsection (d) does not even refer to subsection (a), let alone condition the exercise of condemnation power upon the exhaustion of prescriptive trackage rights. As the ICC found, Amtrak has an "election of remedies" to invoke the condemnation power, provided it can satisfy the express statutory requirements set forth in that provision.[14] *Id.* at 39a, 116a.

The court of appeals erred in assuming that, if there is any overlap in the coverage of subsections (a) and (d), the statute requires Amtrak to apply for relief only under subsection (a). Nothing in the statutory language suggests, let alone compels, such an interpretation. Section 402 provides a range of remedies for Amtrak to employ in gaining the use of a recalcitrant railroad's tracks, and more than one remedy can apply to a single dispute. For example, if Amtrak wants to run a high-speed train over the tracks of a freight railroad and the railroad resists making the tracks available for such accelerated speeds, Amtrak could consider (1) applying for a prescribed trackage rights agreement under Section

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[14] None of the procedures can be initiated except upon the application of Amtrak. 45 U.S.C. 562(d). As the ICC noted, Amtrak did not request the ICC to order remedies other than condemnation, because "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a.

402(a); (2) invoking condemnation under Section 402(d); (3) seeking an order "requiring the railroad to permit such accelerated speeds" under Section 402(f); or (4) seeking an order requiring the "operation of an additional train" under Section 402(g). Those remedies afford different benefits to Amtrak, and nothing in the statute dictates which mechanism Amtrak must prefer, if it can satisfy the criteria for more than one form of relief.[15]

Indeed, the logic of Section 402(d) strongly suggests that Congress did not intend the phrase "required for intercity rail passenger service" to contain an unstated requirement that Amtrak seek the lesser interest of trackage rights, or condemn only an easement, where Amtrak's ultimate aim is use of the tracks. Congress gave detailed consideration to the issue of what lesser interests Amtrak had to accept as reasonable alternatives to condemnation, and spelled out its answer in Section 402(d)(1)(B). Under that subsection, if condemnation will significantly impair the railroad's common carrier functions, Amtrak's "need" for the property will not be presumed where Amtrak's requirements can adequately be met by obtaining either of two alternative property interests: (1) other rail property that is "available" for sale, or (2) non-rail property that can be taken by eminent domain. See pp. 32-33, *infra*. Pre-

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[15] Here, for example, even if Amtrak could have obtained trackage rights under Section 402(a), Amtrak stood to acquire more than just use of the track from the condemnation of B&M's property and its transfer to Central Vermont. The transaction also guaranteed Amtrak the "rehabilitation of the rail line, a guaranteed 20 years of proper maintenance on the rail line, and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level." Pet. App. 42a (footnote omitted).

scriptive trackage rights were not among the alternatives that Congress required Amtrak to consider. The court of appeals undermined Congress's determination in Section 402(d)(1)(B) by imposing an additional proviso limiting the use of condemnation procedures.

3. The court of appeals also surmised that Amtrak's use of Section 402(d) in this case "implicates * * * Congress's policy against cross-subsidization within the rail industry." Pet. App. 2a. As an initial matter, the court of appeals erred in finding that this policy has any bearing on the arm's length transaction that Amtrak entered into with Central Vermont in this case.[16] But there is a further, funda-

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[16] To begin with, RPSA establishes as a goal for Amtrak "[e]ncouragement of * * * the private sector to share the costs of operating rail passenger service * * * in order to minimize Federal subsidies" and "[d]evelopment of service on rail corridors, subsidized by * * * private parties." 45 U.S.C. 501a(2) and (7). In any event, no cross-subsidization occurred in this case. As to B&M, the Commission ordered Amtrak to pay $2.37 million for B&M's line in "just compensation"; B&M was therefore not forced to subsidize Amtrak's activities. Pet. App. 105a. As to Central Vermont, it is apparent that B&M and Central Vermont had quite different economic incentives relating to maintenance of the track at issue here, and it is Central Vermont's greater incentive, and not a cross-subsidy, that accounts for Central Vermont's willingness to perform better maintenance on the track. B&M's affiliate, Delaware & Hudson Railway, owns a parallel line of track that B&M's parent favored over the track at issue here. See note 4, *supra*. Therefore, B&M maintained the Conn River line track only in a condition sufficient to serve its slow-moving local traffic. Central Vermont, in contrast, lacks an alternative rail route for through traffic; it therefore had an independent financial incentive for upgrading the track to high-speed condition. J.A. 125.

mental difficulty: in undertaking to reconcile competing policies on an issue where the statute is silent, the court of appeals overstepped its role in reviewing agency action. "Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866.

The statute entrusts to *the ICC* the implementation of general statutory policies, including any applicable policy against cross-subsidization. Two sources of ICC authority serve to protect the federal rail policies implicated by condemnations. First, the Commission has the power to reject proposed condemnations under Section 402(d) if the transaction constitutes an abuse of RPSA.[17] Here, for example, the ICC determined that Amtrak was not using condemnation to further private aims of Central Vermont and its parent company, but was pursuing public purposes in seeking to restore Montrealer train service. Pet. App. 41a-43a. If Amtrak were to condemn property in order to promote a scheme to benefit private parties, ICC regulation would be available and sufficient to guard against consummation of the scheme.

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[17] Congress made that power explicit in ISBA by conditioning retransfers upon an ICC finding that the conveyance "further the purposes" of RPSA, § 9(a), 104 Stat. 1658, but even before the amendment, the ICC had the power to reject abusive applications under Section 402(d). Cf. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 364-366 (1984).

Second, not only the initial condemnation but also the reconveyance of condemned property by Amtrak is subject to ICC regulation. Under 49 U.S.C. 11343, the ICC has express and comprehensive authority to determine, *inter alia*, when carriers may purchase, lease, or contract to operate property of another carrier. Cf. *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 76 (1944). Amtrak, as a common carrier by railroad, is subject to ICC regulation under Section 11343, see 45 U.S.C. 546(a); so too, of course, is any railroad to which Amtrak seeks to convey rail property. Accordingly, if the ICC concludes that a particular reconveyance would compromise any relevant rail transportation policy, see 49 U.S.C. 10101a, the ICC can block the transaction.[18] In this case, for example, the ICC examined the facts and concluded that application of Section 11343 to Central Vermont's acquisition of the Conn River Line was not required to fulfill the rail transportation policy, see 49 U.S.C. 10505(a); accordingly, it exempted the transaction from prior approval requirements. In light of those statutory tools, the court of appeals' categorical prohibition of reconveyance transactions to protect perceived statutory policies would needlessly erode Amtrak's flexibility and denigrate the ICC's express authority to oversee rail industry transactions.[19]

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[18] One component of the rail transportation policy is to further passenger train service. The Commission is to promote an "efficient" and "sound rail transportation system," 49 U.S.C. 10101a(3) and (4), and "[t]ransportation" is defined to include the "movement of passengers." 49 U.S.C. 10102(26).

[19] The court's constitutional concerns (Pet. App. 21a) about the statute as construed by the ICC are also illusory. The

4. The court of appeals' interpretation is also inconsistent with the policies of RPSA. Congress established as "goals" for Amtrak that it shall provide cost-efficient passenger service; that it shall implement "strategies to achieve * * * maximum productivity and efficiency consistent with safe and efficient service"; and that it shall make the "most cost-effective use of employees, facilities, and real estate." 45 U.S.C. 501a(5) and (14). To that end, Amtrak is to encourage "the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities," and "to enter into agreements with the private sector and undertake initiatives which are consistent with

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"public use" requirement of the Fifth Amendment's Taking Clause does not prohibit compensated transfers between private parties so long as "the legislature's purpose is legitimate and its means are not irrational." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 242-243 (1984); see *Berman* v. *Parker*, 348 U.S. 26 (1954). That standard is surely met here. Congress's purpose in enacting Section 402(d) was to further the formation of a nationwide rail passenger system, and it is a rational means of accomplishing that goal to permit Amtrak to condemn property and transfer it to railroads that will better serve Amtrak's needs. The constitutionality of this provision follows *a fortiori* from the decision in *Hawaii Housing Authority*, since the property here is being put to a use more generally available to the public. Moreover, it is settled that the public purposes served by a national rail system may take precedence over the interests of particular private owners. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 491-492 (1970). Indeed, the court of appeals did not deny that Congress *could* empower Amtrak to effectuate the transaction at issue if it gave "clear[] evidence" of its intent. Pet. App. 21a. Clearer authorization than passage of ISBA in direct and immediate response to the panel's decision in this case can scarcely be imagined. See pp. 26-29, *infra*.

good business judgment and designed to maximize its revenues and minimize Federal subsidies." 45 U.S.C. 501a(2) and (14).

The court of appeals' decision frustrates those policies. Under the court's decision, Amtrak is denied a vital remedy afforded by Congress to prevent disruptions to its intercity passenger service and to lower its operational costs. Because Amtrak's mission is to run passenger trains, it rarely requires exclusive use of a line of track. Especially outside the northeast corridor, it is neither efficient nor feasible for Amtrak to make do on its own; it must be able to share the freight railroads' existing track systems. Amtrak's sharing options are relatively limited in some regions of the country; only one set of tracks is adequate for particular routes. Amtrak must accordingly gain access to reliably maintained tracks on the particular lines it needs.

It is precisely that inflexibility in requirements and lack of negotiating leverage that Congress intended to remedy through Section 402(d). Congress was aware that Amtrak's "inflexible site requirements" might leave it open to economic exploitation by the railroads, see S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973); the legislative solution was to open up the possibility of condemnation—and to ensure that it would proceed quickly.[20] Although in theory Amtrak remains free under the decision below to condemn property if it wishes to become the ultimate owner of the track, that option is a hollow one in most set-

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[20] Under 45 U.S.C. 562(d)(2), the ICC must expedite condemnation proceedings and issue its order no later than 120 days from Amtrak's application. See Pet. App. 124a-125a (ICC expedited this proceeding because of Amtrak's concerns, *inter alia*, that swift measures were necessary to avert further deterioration of the track and to complete the repair before the winter freeze).

tings, for Amtrak lacks both the resources and the expertise to take on the responsibility of owning short stretches of widely dispersed lines. As the concurrence below recognized, the court of appeals' interpretation therefore leaves Amtrak "vulnerable to just the sort of extortion by private landowners pointed to by [the majority] as having motivated Congress to confer the eminent domain power contained in section 402(d)." Pet. App. 27a.[21]

B. The 1990 Amendment Of Section 402(d) Confirms That Amtrak Is Entitled To Condemn B&M's Track And Convey It To Another Railroad

If there were any doubt that the ICC correctly determined that Amtrak has the right to condemn the track at issue, notwithstanding its desire to convey

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[21] The inadequacies of the alternative remedies left to Amtrak under the court of appeals' holding are demonstrated by this case. Before resorting to condemnation, Amtrak attempted to enforce its contractual right to have B&M maintain the Conn River Line in condition fit for high-speed travel. But B&M refused to negotiate or arbitrate, and, indeed, repudiated its contract with Amtrak. See Pet. App. 130a n.11. To compel arbitration, Amtrak was forced to invoke the assistance of the courts. See note 4, *supra*. Litigation of that nature is inherently time-consuming, and, even if Amtrak obtains a favorable decision, it may have to suspend service before the proceedings produce results, as happened in this case. Congress intended through RPSA to provide the means for continuous and reliable intercity rail passenger service. See 45 U.S.C. 501a(6) and (8) (establishing as goals for Amtrak to operate trains "within 15 minutes of the time established in public timetables" and to implement schedules that "provide a systemwide average speed of at least 60 miles an hour, and which can be adhered to with a degree of reliability and passenger comfort"). Those goals were thwarted in this case.

that track to Central Vermont, Congress removed that doubt in ISBA.

1. In direct response to the court of appeals' decision in this case, Congress amended Section 402(d) to clarify that a plan by Amtrak to reconvey condemned rail property after condemnation is not grounds for denying the condemnation under RPSA. ISBA amends Section 402(d) to add, as the final sentence of that subsection:

> The Corporation may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act.

Pub. L. No. 101-641, § 9(a), 104 Stat. 4658. The sponsor of the amendment, Senator Jeffords, explained that it was "intended to clarify the authority used by [Amtrak] in 1988 * * * to acquire a portion of the Montrealer route in the States of Vermont and New Hampshire."

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired. * * *
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> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purposes under [RPSA], as it did in the Montrealer situation. This leaves the structuring of the nationwide rail passenger system to Amtrak's considered discretion, as [RPSA] intends.

136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990). ISBA resolves conclusively the validity of the type of condemnation at issue here.

2. Rather than faithfully applying this amendment, the court of appeals dug in its heels and effectively nullified it. The court dismissed the amendment by characterizing it as providing authority for Amtrak only to convey property after a valid condemnation; the court refused to accept that Congress had overruled the court's conclusion that rail property cannot be condemned where Amtrak could get by with a lesser property interest or with trackage rights. Pet. App. 3a. The court's interpretation not only flies in the face of congressional intent, it also eviscerates the amendment. It ensures that whenever Amtrak intends to convey property it has condemned, the condemnation will be invalid because Amtrak—by definition—will be seeking a greater property interest than it intends to retain.

The result under the court of appeals' approach is that the amendment will serve no purpose at all. Amtrak did not require the authority set forth in the amendment in order to reconvey property acquired through condemnation. Amtrak is vested with the normal powers of a District of Columbia corporation, see 45 U.S.C. 545(a), and can transfer rail property if it complies with regulatory provisions in the Interstate Commerce Act, see 49 U.S.C. 11343. The amendment makes sense only if read to authorize Amtrak to do exactly what it did here: condemn a property interest for the purpose of transferring that interest to another party, provided the ICC finds that the transaction "further[s] the purposes" of RPSA. By making the amendment wholly superfluous, the court's reading grossly abandons the normal rule of statutory construction that "a court should give effect, if possible, to every clause and word of a statute," *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990)

—an error that is all the more egregious here because the amendment was plainly designed to correct the court's mistaken statutory holding in this very case.

3. The court's refusal to recognize ISBA's rejection of its legal theory thwarts the continuing fulfillment of a policy objective to which Congress has given special attention: the rehabilitation and maintenance of the Montrealer. Twice in the past three years Congress has taken specific legislative action to fund and repair the segment of track at issue in this case. Congress obviously intended to secure uninterrupted passenger train service to Vermont in particular and the New England States in general. The decision below prevents Amtrak from achieving that important congressional goal. If ownership of the track reverts to B&M, passengers, state governments, and businesses that depend on reliable public transportation service to this region of the country may well be denied a means to that end that Congress plainly desired them to have. There is no basis for construing the amended Section 402(d) to require that result.[22]

C. The ICC Properly Determined That Amtrak's Statutory Need For B&M's Line Was Established

In setting aside the ICC's order, the court of appeals also relied on what it stated was an alternative ground for decision. The court said that the ICC did

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[22] When it had ownership of the segment at issue, B&M allowed the track to deteriorate to the point where Amtrak's trains averaged 17 miles per hour, which prolonged each trip by two hours. See J.A. 41, 43. Two years elapsed before Amtrak, aided by a special congressional grant, was able to resume service over the line. Without Section 402(d) as a remedy, Amtrak would again encounter great difficulties in preventing the line from falling into disrepair.

not make "adequate findings" to establish Amtrak's "need" for the property in accordance with Section 402(d)(1)(A) and (B), 45 U.S.C. 562(d)(1)(A) and (B).[23] Pet. App. 3a, 18a-20a. At bottom, the court's attack on the ICC's findings is nothing more than a policy disagreement about what the statute requires the ICC to consider in determining Amtrak's need. Under *Chevron*, the court erred in failing to give deference to the interpretation of the ICC.

1. Section 402(d) declares that Amtrak's "need" for railroad property "shall be deemed to be established" *unless* the ICC finds that (A) conveyance to Amtrak "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* (B) Amtrak can fulfill its obligations by the acquisition of an alternative property interest available for sale on reasonable terms, or available to Amtrak by the exercise of its authority to condemn non-rail private property. The court turned the statutory procedure on its head by stating that the

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[23] Section 402(d)(1)(A) and (B), 45 U.S.C. 562(d)(1)(A) and (B, state:

> Unless the Commission finds that—
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> (A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,

the need of the Corporation for the property shall be deemed to be established.

ICC failed to make adequate findings to demonstrate need. Under the plain terms of the statute, Amtrak's need is presumed, *unless* the ICC makes contrary findings on both of the issues identified in the statute. The ICC is not compelled to make findings that affirmatively demonstrate Amtrak's need.

There is an additional, basic legal error in the court of appeals' approach. The court refused to give deference to the ICC's elucidation of the meaning of the two statutory issues that bear on Amtrak's need. The first issue is whether the taking of the property would "significantly impair the ability of the railroad to carry out its obligations as a common carrier." 45 U.S.C. 562(d)(1)(A). The ICC found that impairment of B&M's common carrier functions is not threatened here because Amtrak was required to pay just compensation for the line, and B&M was offered trackage rights to serve its existing local customers as an integral aspect of the proposed taking.[24] Pet. App. 46a, 83a-84a, 91a-92a. As Judge Ginsburg recognized in her concurring opinion, the ICC's consideration of the trackage rights agreement and its ultimate determination that no impairment to B&M's common carrier functions would result were matters "within the ICC's expertise and entitled to judicial deference." *Id.* at 25a. The majority, however, insisted that post-conveyance remedies are entirely irrelevant to the issue of impairment; instead, the majority held that the evaluation of impairment must be restricted to the effects of the condemnation viewed in isolation. Pet. App. 19a.

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[24] Amtrak specifically requested that "the trackage rights over the line for B&M be included as a term and condition of conveyance" to Amtrak under Section 402(d). Pet. App. 38a.

The statute does not dictate that approach, which would impede Amtrak's condemnation of *any* rail property that is useful to the railroad that owns it. As this Court observed in an analogous context, the ICC is not required, in administering its statute, "to put on * * * blinders." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529 (1946). In determining whether there will be common-carrier impairment under Section 402(d)(1)(A), the ICC is entitled to consider the practical results of an overall transaction carried out under Section 402(d). Because the ICC has express authority to impose "reasonable terms and conditions" upon condemnations, 45 U.S.C. 562(d), the agency is well within the bounds of its discretion in taking those conditions into account in determining whether the impairment contemplated by the statute will occur.[25] The court of appeals had no legal justification for dismissing those conditions as "post-hoc" remedies. Cf. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 137 (1978). In this case, there is no basis for disturbing the ICC's exercise of its discretion to determine that B&M's trackage rights agreement would adequately protect B&M's ability to carry out its common carrier obligations.[26]

2. Because the ICC properly found the absence of any impairment to B&M's ability to fulfill its common carrier obligations, Amtrak's statutory need was established without regard to whether Amtrak

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[25] The ICC also has the power to impose conditions on the subsequent reconveyance of track. 49 U.S.C. 11344(c).

[26] The ICC's predictive determination about the impact of the transaction on B&M's ability to serve shippers, based on the Commission's familiarity with the industry it regulates, merits special deference. *Bowman Transp.* v. *Arkansas Best Freight System, Inc.*, 419 U.S. 281, 293 (1974); see *FCC* v. *National Citizens Comm'n*, 436 U.S. 775, 813-814 (1978).

had alternative property interests available to it. 45 U.S.C. 562(d)(1)(B). See Pet. App. 25a (concurring opinion). But the ICC also addressed that issue, concluding that no other alternative rail route through Vermont would be feasible for the Montrealer. *Id.* at 45a-46a. The court of appeals rejected that conclusion because the ICC had not considered whether condemnation of a "lesser interest," such as an easement in the *B&M* rail line, would suffice. But it was for the ICC, not the court, to determine whether that was the sort of alternative interest that it had to consider.[27] *Chevron, supra.*

In contrast to the strained reading of the court of appeals, the ICC quite sensibly asked whether there was "alternative" property available in the form of a different route over another railroad's track; it then rejected B&M's proposal that a route through Schenectady, New York, would be sufficient. The ICC explained that such a route would not serve Connecticut, Massachusetts, Vermont, and New Hampshire—all of which Amtrak desired to serve with its Montrealer train. The ICC further explained that any other rail route through Vermont "would require rehabilitation expenditures far beyond the funding sources available to Amtrak." Pet. App. 45a-46a. The ICC's application of the statute in that fashion was entirely reasonable.[28]

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[27] Indeed, the plain language of the statute appears to be incompatible with the court's suggestion that trackage rights under Section 402(a) might be an adequate "alternative property" interest. Pet. App. 19a-20a. The statutory alternatives are rail property that is "available for sale" and non-rail property that may be taken by eminent domain under Section 305(d), 45 U.S.C. 545(d). A grant of trackage rights under Section 402(a) does not fit into either category.

[28] Even if the ICC had erred in its interpretation of the statutory criteria for establishing Amtrak's need, the lower

D. The Commission's Order Requiring The Conveyance of B&M's Track To Amtrak And Its Subsequent Reconveyance Should Be Upheld

Under a proper interpretation of the statute, the ICC's order directing the conveyance of B&M's line to Amtrak, and its subsequent transfer to Central Vermont, should be upheld. All of the requirements for conveyance under Section 402(d) were satisfied in this case.[29]

B&M's line was condemned by Amtrak "so that Amtrak may resume its Montrealer passenger service over" the relevant portions of the Conn River Line, Pet. App. 29a, 122a, and was therefore "required for intercity rail passenger service" within the meaning of Section 402(d). In light of ISBA, it cannot be claimed that Amtrak's plan to reconvey the property to Central Vermont is a reason for invalidating the transaction.

Moreover, Amtrak's "need" for the property was established by the ICC's order. The Commission found that the conveyance would not impair B&M's

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court's decision would depart from longstanding principles governing judicial review of administrative action in failing to remand to the ICC for evaluation of the facts in light of the correct legal standard. See *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901); *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); cf. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (per curiam).

[29] As threshold matters, Amtrak and the railroad must be "unable to agree upon terms for the sale" of the subject property and Amtrak must apply for an order of conveyance. 45 U.S.C. 562(d). The ICC properly found that Amtrak's offer to B&M to purchase the Conn River Line, followed by B&M's negative response, adequately demonstrated that the parties were unable to agree, and Amtrak filed the requisite application. Pet. App. 40a, 119a-120a, 130a-131a.

ability to fulfill its common carrier functions, and, in any event, Amtrak could neither buy available rail property nor condemn non-rail property for the purpose of providing passenger train service through Vermont.

Finally, the reconveyance to Central Vermont may be permitted "if such reconveyance is found by the [ICC] to further the purposes" of RPSA. ISBA, Pub. L. No. 101-641, § 9(a), 104 Stat. 4658. Although ISBA was enacted after the ICC issued its order, the Commission's findings demonstrate that RPSA's purposes are furthered in this case. The Commission explained that Amtrak's reason for seeking conveyance of the line—to reinstitute Montrealer service—is a valid "public purpose." Pet. App. 44a-45a. Moreover, the ICC rejected B&M's claim that a decision in Amtrak's favor would lead to abuses of the condemnation power, stating that "[w]e will not permit transfers that are not in the public interest and consistent with the relevant statutory criteria." *Id.* at 43a. Indeed, the ICC specifically rejected B&M's claim that the present transaction was an abuse of the Act.[30] In the light of those findings, which constituted the very model for Congress's enactment of ISBA, the ICC's order allowing the condemnation of B&M's track should be upheld.[31]

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[30] B&M asserted that the present transaction was part of a scheme to further the interests of Central Vermont, a competitor of B&M. The ICC, however, upheld Amtrak's submission that it had negotiated at arm's length to achieve legitimate "public interests" and that Amtrak "has not abused the process available under § 402(d) by means of its dealings with [Central Vermont]." Pet. App. 41a-42a.

[31] Because the court of appeals did not reach the challenges to the ICC's just compensation finding as well as certain

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

JOHN G. ROBERTS, JR.
Acting Solicitor General *

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

NOVEMBER 1991

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other issues raised in the petitions for review, Pet. App. 13a-14a, the case should be remanded for consideration of those issues.

*The Solicitor General is disqualified in this case.

APPENDIX

1. Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d), provides:

> (1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
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> > (A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
> >
> > (B) the obligations of the Corporation to provide modern, efficient, and economical rail pasesnger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,
>
> the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

2. Section 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, provides:

(a) Section 402(d)(1) of the Rail Passenger Service Act (45 U.S.C. § 562(d)(1)) is amended by adding at the end the following new sentence:

"The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of the Act."

(b) The amendment made by subsection (a) shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment).

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